IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LA CHOLLA HILLS HOMEOWNERS ASSOCIATION, Plaintiff/Appellee, v. JAMES EDWIN FOARD, Defendant/Appellant.	2 CA-CV 2007-0015 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20064281

Honorable Leslie B. Miller, Judge

AFFIRMED

John A. Baade — Tucson

and

Tanis A. Duncan — Tucson
Attorneys for Plaintiff/Appellee

Sidney F. Wolitzky — Tucson
Attorney for Defendant/Appellant

V Á S Q U E Z, Judge.

¶1 Appellant James Edwin Foard appeals from the trial court's issuance of a mandatory injunction requiring him to remove a shed he erected on his property. He argues the trial court erred by finding that the shed was in violation of the Covenants, Conditions and Restrictions (CC&Rs) of appellee La Cholla Hills Homeowners Association and that he was bound by the CC&Rs. He also argues that the application of the CC&Rs was unreasonable and that he should have been permitted to erect the shed as a reasonable accommodation for a disability. Finding no error, we affirm.

Background

¶2 "'We view the facts in the light most favorable to sustaining the trial court's judgment.'" *Cimarron Foothills Cmty. Ass'n v. Kippen*, 206 Ariz. 455, ¶ 2, 79 P.3d 1214, 1216 (App. 2003), *quoting Southwest Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 2, 36 P.3d 1208, 1210 (App. 2001). Foard is the owner of a home in the La Cholla Hills subdivision of Tucson. His property, along with the other 388 homes in the subdivision, is subject to recorded CC&Rs, as well as to Rules and Regulations promulgated by the Board of Directors of the La Cholla Hills Homeowners Association (La Cholla Hills). Between 1995 and 2000, Foard had an ongoing dispute with La Cholla Hills over backyard storage on his property. In January 2000, as part of the settlement of that dispute, Foard signed a letter acknowledging the CC&Rs, the Rules and Regulations, and the La Cholla Hills Board's authority to enforce them. In a handwritten notation on the letter, he reserved "the right to seek court relief from Board decisions."

¶3 In September 2005, Foard suggested that La Cholla Hills delete storage sheds from the list of structures prohibited by the Rules and Regulations. He contacted La Cholla Hills again in October and November 2005, challenging as unreasonable the rule that prohibited sheds. In January 2006, Foard apparently requested permission to install a shed; his request was denied by La Cholla Hills in February 2006. In March and April 2006, Foard wrote to La Cholla Hills stating his intention to install a shed notwithstanding their ruling, and he erected a shed on his property on approximately May 31, 2006.

¶4 In June 2006, La Cholla Hills instructed Foard to remove the shed. Foard responded that he had no intention of doing so. La Cholla Hills then brought this action seeking an injunction requiring Foard to remove the shed within thirty days and permitting La Cholla Hills to enter Foard's lot to remove it if he failed to comply. After a bench trial on the merits, the trial court found that the shed was in violation of the CC&Rs.[1] The court granted the requested injunction and awarded La Cholla Hills $714.60 costs and $4,505 in attorney fees. This appeal followed. We have jurisdiction under A.R.S. § 12-2101(B).

Standard of Review

¶5 We review a trial court's grant of injunctive relief and award of attorney fees for an abuse of discretion. *See Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). CC&Rs are a contract between a

[1]The court also found the shed was in violation of La Cholla Hills' Rules and Regulations, which included storage sheds in a list of structures which "are not allowed."

subdivision's property owners as a whole and individual lot owners. *Id.* Contract interpretation presents questions of law, which we review de novo. *Id.* "To the extent that we are confronted with questions of fact, we are bound by the trial court's findings unless they are clearly erroneous." *Id.*

Discussion

¶6 Foard argues that according to the "plain meaning" of the La Cholla Hills CC&Rs, his shed is permitted. Before considering this central issue, we first consider Foard's contentions that the Board, in any event, unreasonably applied the prohibition to him; that he should have been permitted to erect the shed as a reasonable accommodation for a disability; and that he was not bound by the CC&Rs.

¶7 Foard appears to conflate two different legal principles in arguing it was unreasonable for La Cholla Hills to enforce a prohibition on storage sheds. First, he cites the Restatement (Third) of Property: Servitudes § 6.7 (2000), for the proposition that a homeowners' association may only restrict the use of an individual homeowner's property where that use "negatively and unreasonably affects other owners." This proposition may be true under some circumstances when applied to rules and regulations promulgated by homeowners' associations. *See Wilson v. Playa de Serrano*, 211 Ariz. 511, ¶ 8, 123 P.3d 1148, 1150 (App. 2005). However, both the Restatement and our case law make a clear distinction between such rules and regulations, on the one hand, and deed restrictions, such as those contained in CC&Rs, on the other. *Id.* Unlike an association's rules and

regulations, deed restrictions are recorded before individual properties are sold and constitute "a contract between [a] subdivision's property owners as a whole and individual lot owners." *Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993).

¶8 If the CC&Rs do not provide for the adoption of a particular restriction or requirement, such restriction or requirement is invalid. *See Wilson*, 211 Ariz. at ¶ 7, 123 P.3d at 1150. But, when the CC&Rs themselves restrict a homeowner's use of his property, such a restriction will generally be upheld unless it is illegal, unconstitutional, or in violation of public policy. *See* Restatement (Third) of Property: Servitudes § 3.1 (2000). Here, La Cholla Hills relies on the CC&Rs, not on its Rules and Regulations, as authority for its position that the shed is prohibited.[2] Therefore, Foard's argument is without merit.

¶9 Second, Foard asserts the trial court's ruling "imposes an unfair burden [on him] which outweighs the benefits to the community." He claims "the shed . . . was hardly visible to other homeowners" and "[i]f you can't see it, then it can not negatively impact the other homeowners." Foard's argument appears to implicate the equitable argument that, in enforcing a restrictive covenant by injunction, a court should balance the "relative

[2]While it is not always clear what the parties and the court are referring to when they use the term "rule," La Cholla Hills' complaint below cited only the CC&Rs, and Foard's central argument regarding "the plain meaning of the rule" is necessarily addressed to the CC&Rs, since the Rules and Regulations explicitly prohibit storage sheds. Because we find the CC&Rs prohibit storage sheds, we need not analyze whether that section of the Rules and Regulations prohibiting sheds was reasonable and authorized by the CC&Rs.

hardships" on the homeowner and the neighborhood. *See Ahwatukee*, 196 Ariz. 631, ¶ 9, 2 P.3d at 1280. However, "equitable discretion should not be used to protect an intentional wrongdoer." *Decker v. Hendricks*, 97 Ariz. 36, 41-42, 396 P.2d 609, 612 (1964). We have therefore rejected this equitable argument where, as was true of Foard here, "a party is aware of a restriction and of some homeowners' intent to enforce the restriction but nonetheless builds an offending structure." *Flying Diamond Airpark LLC v. Meienberg*, 215 Ariz. 44, ¶ 11, 156 P.3d 1149, 1152 (App. 2007). The trial court did not abuse its discretion by failing to consider the relative hardships to Foard and his neighbors.

¶10 Foard also argues he should have been permitted to erect the shed as a reasonable accommodation of a disability pursuant to A.R.S. § 41-1491.19. However, the record does not show Foard made this argument below; therefore, he has waived it on appeal. *See Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, ¶ 7, 153 P.3d 1069, 1071 (App. 2007) (arguments not raised in trial court waived on appeal).[3]

¶11 On the issue of whether Foard was bound by the CC&Rs, we are not persuaded by his argument that the letter of January 27, 2000, resolving the parties' prior

[3]In any event, Foard provides no evidence that he actually has a disability based on his claim that he can no longer play tennis. His conclusory assertion that tennis is "'one major life activity' as defined by the statute" is contrary to the case law on this issue, which finds without exception that tennis is not a major life activity. *See Weber v. Strippit, Inc.*, 186 F.3d 907, 914 (8th Cir. 1999); *Kirkendall v. United Parcel Serv., Inc.*, 964 F. Supp. 106, 110 (W.D.N.Y. 1997). And we doubt that Foard's shed is the type of reasonable accommodation "necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling" provided for by A.R.S. § 41-1491.19(E)(2).

dispute, "constituted a novation" to the contract between him and La Cholla Hills. On the contrary, in the letter Foard explicitly reaffirmed his acceptance of the CC&Rs and the Board's authority to enforce them. While Foard also asserted his right to challenge the La Cholla Hills Board's decisions in court, this unilateral assertion did not create any new rights or extinguish any existing obligations.[4] Therefore, the letter was not effective as a novation. *See United Sec. Corp. v. Anderson Aviation Sales Co., Inc.*, 23 Ariz. App. 273, 275, 532 P.2d 545, 547 (1975) (finding extinguishment of previously valid obligation and all parties' agreement to new contract necessary for valid novation). Thus, the trial court did not err in finding that Foard had accepted the requirements of the CC&Rs when he chose to own a home in the La Cholla Hills development and that he had acknowledged their binding force in his January 2000 letter.

¶12 Finally, we turn to Foard's central argument that the shed was permitted under the "plain meaning" of the CC&Rs. The interpretation of covenants is a question of law that this court reviews de novo. *Powell v. Washburn*, 211 Ariz. 553, ¶ 8, 125 P.3d 373, 375-76 (2006). Foard contends "the interpretation of restrictive covenants should be resolved in favor of the free use and enjoyment of the property." Our supreme court, however, has

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[4]Foard himself cites many examples of homeowners' exercising their right to challenge their homeowners' associations in court, without resulting in any special modification of their contracts. *See Wilson v. Playa de Serrano*, 211 Ariz. 511, 123 P.3d 1148 (App. 2005); *Johnson v. Pointe Cmty. Ass'n, Inc.*, 205 Ariz. 485, 73 P.3d 616 (App. 2003); *Gfeller v. Scottsdale Vista N. Townhomes Ass'n*, 193 Ariz. 52, 969 P.2d 658 (App. 1998).

rejected such a principle, embracing instead "the contemporary judicial trend of recognizing the benefits of restrictive covenants." *Powell*, 211 Ariz. 553, ¶¶ 15-16, 18, 125 P.3d at 377-78. Under this approach, CC&Rs should be interpreted to give effect to the intention of the parties and to carry out the purpose for which the restrictions were created. *Id.* ¶ 13. By their terms, the La Cholla Hills CC&Rs are "intended to control the general use of the Lots by the Owners." Further, Section 11.5.1 provides that "[t]he location, style or architecture, exterior color schemes and height of [any] improvement, as well as the location of exterior lighting, shall be in harmony with the structures on any other Lot." Based on this and other restrictions, we find that one of the purposes for which the CC&Rs were created was to ensure uniformity among structures on different lots within the subdivision.

¶13 "While it is true that courts should not give a covenant a broader than intended application, it is well settled that a covenant should not be read in such a way that defeats the plain and obvious meaning of the restriction." *Arizona Biltmore Estates Ass'n*, 177 Ariz. at 449-50, 868 P.2d at 1032-33 (citations omitted). In this case, Foard argues that the plain meaning of Section 12.5 of the La Cholla Hills CC&Rs, on which La Cholla Hills relies for its position that storage sheds are not permitted, is to prohibit only multi-family dwellings and mobile equipment. We disagree.

¶14 The relevant parts of Section 12.5 state, under the heading "No Temporary Building or Trailers":

> No temporary house, house trailer, motor home, recreational vehicle, garage, camper or truck with camper shell, boat or out-

> building of any kind shall be placed or erected on any Lot . . . . During the actual construction or alteration of any building on any Lot, necessary temporary buildings for storage of materials may be erected . . . .
>
> No building of any nature shall be moved onto any Lot without the consent of the Board.

¶15 Foard contends that because the term "storage shed" does not appear here or anywhere else in the CC&Rs, such sheds are not prohibited.[5] However, in *Powell*, our supreme court rejected a similar argument that the failure to mention recreational vehicles (RVs) in a set of CC&Rs "left 'the door open to the use of an RV,'" finding that such a conclusion was "contrary to the intent and the purpose of the CC & Rs." 211 Ariz. at ¶ 28, 125 P.3d at 379-80. Given our analysis of the intent and purpose of the CC&Rs in this case, we likewise decline to interpret the absence of an explicit reference to storage sheds as permitting their erection by homeowners in the La Cholla Hills subdivision.

¶16 Foard alternatively argues that his shed is a "temporary structure," not an outbuilding, and is therefore not covered by the prohibition on outbuildings in Section 12.5. We are not convinced by this argument. An outbuilding is defined as "[a] detached building (*such as a shed* or garage) within the grounds of a main building." *Black's Law Dictionary*

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[5]Foard also contends La Cholla Hills produced nothing at trial to show that the CC&Rs prohibited sheds. However, since the transcript of the trial is not part of the record on appeal, we will presume the missing portions of the record support the action of the trial court. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Further, because La Cholla Hills introduced into evidence at trial a definition of "outbuilding," as well as the entire text of the CC&Rs, we can infer the court relied on those items as a basis for its ruling.

1128 (7th ed. 1999) (emphasis added). Furthermore, Section 12.5 of the CC&Rs indicates in three other ways an intent to prohibit sheds such as Foard's. First, the words "no temporary building" in the title of the section appear on their face to include sheds, particularly if we accept Foard's definition of a shed as a temporary structure. Second, the section's prohibition on moving buildings "of any nature" onto a lot also appears to apply to Foard's shed, which he bought from a home improvement store and moved onto his lot. Third, if there were no intent to prohibit storage sheds generally, the provision in Section 12.5 permitting temporary storage buildings under certain circumstances would be redundant. *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 158 n.9, 854 P.2d 1134, 1144 n.9 (1993) ("a contract should be interpreted, if at all possible, in a way that does not render parts of it superfluous"). Thus, when we consider the language of Section 12.5 in conjunction with the CC&Rs' stated intent to control the use of individual lots and their purpose of ensuring uniformity in the structures permitted throughout the subdivision, we conclude Foard's shed falls within the types of structures the CC&Rs prohibit.

¶17 Finally, Section 14.2 of the CC&Rs provides that "[t]he prevailing party in any Court action to enforce the Governing Documents shall be awarded reasonable attorney fees, litigation expenses and court costs." Thus, the trial court did not abuse its discretion in awarding attorney fees and costs to La Cholla Hills as the prevailing party at trial.

Disposition

¶18 For the foregoing reasons, we affirm the trial court's judgment. Pursuant to the CC&Rs, we further grant La Cholla Hills' request for reasonable attorney fees and costs on appeal upon its compliance with Rule 21(c), Ariz. R. Civ. App. P.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge